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Wednesday, September 29, 2010

Bugs in the stack

Continuing at long last with my series on the history of Roman law, I will introduce two of the central players: the administrator and legal scholar Tribonian and his master Justinian, emperor of the late Roman ("Byzantine") empire from 527-565 A.D. Today however, a bit about the importance of their legal code.

If law shapes society's most basic structures, as master genes -- genes that control other genes -- shape the basic form of our bodies, then Justinian's Code is the ancestral master DNA of the West. If society is a protocol stack and law is a low-level protocol governing our higher-level interactions of politics and commerce, then it's fair to say that the Justinian Code was the Internet Protocol that long governed, and still in many ways governs, the Web that is Western society.

If tech metaphors don't do it for you, let's try religion: Justinian was the Moses of the Western legal world. When the first universities, which were practically just law schools, were founded in Italy in the 11th century, the newly rediscovered Justinian Code was the main draw and the center of the curriculum.

Variations of the legal system of Justinian and Tribonian have been taught in Western universities, and often enacted into the law of Western societies, ever since. And indeed in the 19th and 20th centuries these variations were enacted into law all over the world. The only substantial exception, a partial exception, to the overwhelming influence of this code has been the English legal system and its offshoots.

Ideas derived from Justinian's Code also form many of the basic and often flawed assumptions of the political science and philosophy of law taught in universities to this day.

The Romans had a highly evolved substantive law of crime, torts ("delicts"), property, contracts, and many other commercial and personal matters. In these areas the preservation and recovery of the Roman law was indispensible. The influence of the procedural and constitutional aspects of Justinian's Code was quite another matter, as I hope to detail in future posts. The strong influence of Justinian and Tribonian over Western procedural and constitutional law started with the universities, continued in the Romanization of Continental law during and after the Renaissance, accelerated with the codifications of the Prussians and Napoleon of the 18th and 19th centuries, and reached its zenith with the totalitarian dicatorships of the 20th century. Only some of the odious influence of the procedural law that Tribonian and his crew assembled and drafted for their master has gone into perhaps temporary decline since

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Nick Szabo

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then.

The historian Procopius, who served in Justinian's army, was a superstitious, or at least creatively metaphorical, man who thought that Justinian was a fiend sent from hell to do maximum destruction to the world. That opinion was only based on the consequences of Justinian in his own lifetime. The cumulative influence of his procedural and constitutional laws on the world since that time has been overwhelmingly more harmful.

Tribonian in the service of Justinian introduced and passed on fundamental flaws in the Western political DNA. Or, to switch back to our other tech metaphor, some severe bugs in the lowest layer of our society's protocol stack.

Coming up: introductions to Justinian and Tribonian.

Posted by Nick Szabo at 3:10 PM

3 comments:

Holy Moly said...

The Secret History is an entertaining read. I'm looking forward to your take.

10:50 AM

TGGP said...

"Law and Revolution" focuses a lot on the universities' (and Church's) rediscovery or Roman law. But Berman regards it as a very good thing which created the modern West. I'm guessing you've already read it.

Brad Delong shares an anecdote about Justinian here.

1:55 PM

nick said...

I've read Berman and indeed recommend him. As far as substantive law goes, I tend to agree with him. The late Roman Empire was a bottleneck through which a remnant, but still a rich remnant, the ancient law that had been evolved over millenia in Sumer, Babylon, Phoenicia, and Rome had passed. So the Justinian Code contained many ideas and concepts that helped enrich property law and the developing Lex Mercatoria.

But in terms of procedural and constitutional law, it gave the sanction of ancient authority to the late Roman absolutist and totalitarian view of government. This view would give authority to the Tsars and Kaisers ("Caeasars"), the emperor Napoleon, and in the 20th century to Lenin, Stalin, Hitler, and Mao. Late Roman legal principles would end up destroying the alternative paradigm of political property rights (which once dominated the West but have now been almost completely forgotten) and would severely hamper efforts to separate powers. And would spawn absolutist theories of sovereignty such as those of Bodin, Hobbes, and Carlyle.

DeLong in his post sounds like the traditional university professor, still swimming in the thousand-year-old fish tank of university ideology (with origins in teaching Justinian's Code). Still reflexively defending its hero, absolute central government, and failing to ask, for example, whether the local lords were actually doing a better or worse job in providing more security for less taxation and

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violation of rights. Instead the "local thug" is automatically the bad guy -- no evidence needed.

He might try doing as I have and actually reading some primary history, for example John of Lydia, a tax collector under Justinian who describes in horrid detail the effects of Constantinple's taxes on the farmers of their em]mpire. All the more credible in being what we in the law call a "declaration against interest."

And reading Procopius who describes how Justinian chose to fight foreign wars of conquest rather than guarding Byzantium's borders against foreign invasion or enforcing the law at home. Said problems of foreign invasion and crime provided plenty of good reasons for local landlords to hire their own security staff.

A thousand years after the recovery of the Justinian Code and the birth of universities, professors like DeLong are still prostrating themselves intellectually to Justinian, just as Tribonian prostrated himself physically.

Much more in this hopefully in future posts.

3:25 PM

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